

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

WILLIAM M. FORD

Plaintiff,

VS.

OFFICER COZIE RAY, and OFFICER
BOBBY J. McKINNEY,

Defendants.

CIVIL ACTION FILE
NO. 1:04-CV-42(WLS)

RECOMMENDATION

Presently pending in this § 1983 action brought by a *pro se* state prisoner are motions seeking the entry of a default judgment against defendant Ray and a motion seeking a partial summary judgment as to the liability of the defendants. Both motions are pending at document number 13.¹ The gravamen of plaintiff's complaint is that he was subjected to excessive force when arrested by the above named defendants.

Motion for Default Judgment against Defendant Ray - filed July 22, 2005.

As will be seen below, plaintiff's motion is premature. Defendant Ray was not in default at the time of the filing of plaintiff's motion and he has subsequently filed a timely answer. For these reasons the undersigned will recommend that the motion for default judgment be denied.

On June 13, 2005, the undersigned ordered service of the complaint upon the above named defendants (document # 9). The U. S. Marshal Form 285, Process Receipt and Return was filed on June 14, 2005 (document # 10). The accompanying Waiver of Service of Summons form

¹In a separate order entered on October 31, 2005, the undersigned denied plaintiff's motion for the appointment of counsel, which was also pending at document number 13.

gave Defendant Ray sixty (60) days from June 16, 2005, in which to file his answer (document # 15). Thus, this defendant had until August 15, 2005, to file his answer to the complaint. The answer was timely filed on August 8, 2005 (document # 17). Therefore, this matter clearly not being in default, it is the **RECOMMENDATION** of the undersigned that plaintiff's motion be **DENIED**. Pursuant to 28 U.S.C. § 636(b)(1), the parties may file written objections to this recommendation with the Honorable W. Louis Sands, Chief United States District Judge, WITHIN TEN (10) DAYS of receipt thereof.

Motion for Partial Summary Judgment as to Liability of Defendants - filed July 22, 2005

As earlier noted plaintiff has filed three separate motions in the one document now being considered by the court. When reading this document as a whole it becomes apparent that plaintiff has not shown that he is entitled to the entry of partial summary judgment as to the issue of liability. Plaintiff's motion for partial summary judgment begins on page 9 of document # 13 wherein plaintiff requests the court "grant him summary judgment as the liability of defendants Officer Cozy and Officer McKinney, for damages of Due Process of Law." On page 10 plaintiff goes on to state, "I submitted this declaration in support of my motion for partial summary judgment on my claim of denial of due process. (I have not moved for summary judgment on the assault and medical care claims because there are clear factual dispute [sic] concerning them.)" It thus appears that the plaintiff is claiming that the actions of the defendants in taking him into custody constituted a denial of his due process rights. Plaintiff also states on page 10 of his motion that, "I was running from the Law officials because I did not wanted [sic] to revoke [sic] my probation. I refused to stop running officer McKinney ran me down and handcuffed me."

Although plaintiff is alleging a denial of his due process rights, he states on page 11 of his motion, “[o]n March 2004 I was subjected to a hearing of this offense. The evidence at the hearing consisted solely of his [sic] written report of the defendants. And was sent to prison on the police report.” It thus appears obvious that plaintiff received some type of hearing regarding the circumstances of his arrest. Given what has thus far been presented to the court it simply can not be found at this juncture that the conduct of these defendants amounted to a denial of plaintiff’s due process rights to the extent that summary judgment should be entered against them.

In their response the defendants point out that the plaintiff’s motion, filed before their answer is premature and that the defendants were never served with the motion at the time of its filing. In view of the fact that the undersigned can not find from the record as it currently exists that the defendants violated plaintiff’s due process rights, and further because the motion is premature and was not served upon the defendants at the time of its filing it is **RECOMMENDED** that plaintiff’s partial motion for summary judgment be **DENIED** without prejudice to his right to properly re-file and serve same. Pursuant to 28 U.S.C. § 636(b)(1), the parties may file written objections to this recommendation with the Honorable W. Louis Sands, Chief United States District Judge, WITHIN TEN (10) DAYS of receipt thereof.

SO RECOMMENDED, this 1st day of November 2005.

/s/ Richard L. Hodge
RICHARD L. HODGE
UNITED STATES MAGISTRATE JUDGE